No. ~~1468~~ 118

IN THE

Supreme Court of the United States

October Term, 1946

HOME BENEFICIAL LIFE INSURANCE CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Petition for Writ of Certiorari
To the United States Circuit Court of Appeals
For the Fourth Circuit.

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Dated June 7, 1947

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Petition for Writ of Certiorari
To the United States Circuit Court of Appeals
For the Fourth Circuit

Home Beneficial Life Insurance Co., Inc. (hereinafter called the Company), prays that a writ of certiorari issue to review the decree (R. 465)[1] of the United States Circuit Court of Appeals for the Fourth Circuit entered on January 7, 1947, enforcing an order (R. 1) of the National Labor Relations Board (hereinafter called the Board) except as to certain agents of the Company and as to them remanding the cause to the Board for additional findings and conclusions as indicated in its opinion.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 159 F. (2d) 280. The Order denying the Company's petition for rehearing is not yet reported. The Decision and Order of the Board is reported in 69 N.L.R.B. No. 5.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on January 7, 1947. The Company's Petition for a Rehearing was denied March 10, 1947. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and under

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[1]Pursuant to a stipulation of the parties (R. 497) the record for the purpose of this petition consists of the proceedings in the Circuit Court of Appeals, portions of the record printed in Appendix to Petitioner's Brief in the Circuit Court of Appeals and portions of the record printed by the Board as an appendix to its brief in the Circuit Court of Appeals. The Record will be referred to herein as (R. ....).
There has been filed with the clerk the entire original record certified and filed by the Board in the office of the clerk of the court below or otherwise on file in that office.

Section 10(e) and (f) of the National Labor Relations Act (hereinafter called the Act).

STATUTE INVOLVED

The pertinent provisions of the Act are set forth in the Appendix.

QUESTIONS PRESENTED

1. Whether employees of the Company who were discharged while on strike, but who were discharged for reasons other than reasons proscribed by the Act, are entitled to reinstatement.

2. Whether the Company, which had not been guilty of an unfair labor practice, may be required to reinstate striking employees whose application for reinstatement was conditioned upon the reinstatement of employees who had been validly and effectively discharged.

STATEMENT

The Company is engaged in the sale of ordinary and industrial life, benefit and accident insurance. A large part of its business is the sale of industrial policies and the great bulk of that business is carried on by agents in the field. These agents not only travel about soliciting business but also visit the homes of policy-holders to collect weekly premiums and to make payment of claims (R. 121-3). The Company maintains contact with these agents by requiring them to report to their respective district offices[2] each morning[3] before going to work to turn in money collected the

[2]The Company maintains 26 district offices, variously located in the District of Columbia, Virginia, Delaware, Maryland and Tennessee (R. 158).

[3]Monday through Friday.

previous day and to receive instructions (R. 121-3).

This case is an outgrowth of a dispute between the Company and certain of its agents relating to the rule requiring the agents to report to their respective offices each morning before beginning work.

When, after discussion with representatives of the American Federation of Industrial and Ordinary Insurance Agents' Union (hereinafter referred to as the Union) which represents many of its agents for the purpose of collective bargaining (R. 158), the Company declined to reduce the number of days per week in which agents were required to report, the agents in the Company's Washington, D. C., districts took matters into their own hands. They held a meeting of their Local of the Union and notified the Company by telegram that they had voted to report to their offices only two mornings per week (R. 246). After issuing a warning that anyone failing to comply with the reporting rule would be discharged, the Company, believing its Washington agents were acting in accordance with the intent and purposes declared in the telegram aforesaid, discharged those agents who did not thereafter report as required by the rule (R. 152, 247). The fact was, however, that on the morning the Washington agents were discharged, some, but not all of them, were actually engaged in a strike; that is, a complete stoppage of work as contrasted with the original program of working without reporting, in disobedience of the rule.[4] The Circuit Court of Appeals has found the

[4]The Company strenuously contended before the Board that there never was in fact a strike in Washington; upon a conflict of evidence and upon actual records impeaching many of the Union witnesses the Board found that there was a strike. The statement, here made, that there was a strike in Washington is merely a recital of the facts which, because of the findings below, are assumed for the purposes of this petition and is not intended as a concession by the Company as to the truth thereof.

Union deliberately withheld from the Company all knowledge of the strike and so far as the Company knew all of the Washington agents who did not report were simply refusing to obey the Company's rule[5] (R. 470).

The chronological sequence of events which produced such a result was as follows:

Monday (October 9, 1944):
Union telegram stating that effective October 10th, Washington agents would report only Wednesdays and Thursdays each week (R. 246).

Tuesday (October 10, 1944):
Washington agents worked but did not report (R. 93).

Wednesday (October 11, 1944):
Washington agents worked and reported (R. 93) and Company telegram read to agents stating that those who did not thereafter comply with rule would be discharged (R. 102).

Thursday (October 12, 1944):
Washington agents worked and reported. Washington agents held union meeting and took strike vote (R. 103). Union representatives met with Company officials to discuss report rule, but the plan to strike, as the Circuit Court of Appeals has found, was carefully concealed by the Union representatives[6] (R. 470).

Friday (October 13, 1944):
Washington agents did not report; Company discharged them for disobedience of its rule (R. 152). Some were in fact working; others were in fact on strike.

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[5]As a matter of fact the Company first heard of the Washington strike vote at the hearings in this case in 1945 (R. 147).

[6]The dispute had been certified to the National War Labor Board which had notified the parties that if there were a strike it would not hear the case (R. 125).

Subsequent to the Washington discharges, agents in some of the Company's other districts struck in sympathy (R. 68).

Thereafter, negotiations were carried on between the Company and representatives of the Union, which negotiations resulted in the Union's offer of November 11, 1944, to return all agents, including *all* Washington agents, to work (R. 241). The Company refused this offer on the ground that the Washington agents had been effectively and finally discharged and because the Company would not reinstate the discharged agents unless there were a general settlement of all questions which could not be reached between the parties (R. 243).

Thereafter, most of the agents outside of Washington were returned to work (R. 160). All were reinstated who offered to return without insisting on reinstatement of the Washington agents.

The opinion of the Circuit Court of Appeals based upon the foregoing facts states:

> "If the situation had actually been as the Company believed it to be, the Company would have been well within its rights in discharging the Washington agents and in refusing to reinstate them." (R. 470).

And then goes on to say:

> "We should recognize the existence of this strike as a factor of paramount importance, and give it the effect provided in the statute * * *. We conclude that the men who struck on October 13[7] and offered to return on November 11 are entitled to reinstatement.

[7]The men referred to are Washington agents.

"All of the Washington Agents did not strike on October 13." (R. 471).

Without considering in its opinion the undisputed fact that the offer of November 11, to which the opinion referred, was conditioned upon the return of *all* agents involved in the controversy, whether strikers or not (R. 241, 243, 327), and although Petitioner had raised the point, the court enforced the order of the Board requiring the reinstatement of all the agents, except those in Washington, with back pay from November 11, 1944. As to the Washington agents, the court below remanded the case to the Board to determine which of them were, and which were not, on strike at the time of the October 13 discharges, and directed that those who were actually on strike at the time of the discharges were entitled to be reinstated with back pay to run from the date on which the Company first had knowledge that a strike had existed in Washington, and that those who were not on strike had been discharged on October 13.*

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below, holding that the existence of a strike in Washington, by reason of Section 2 (3) of the Act, precluded the otherwise valid exercise of the right to discharge, would, if permitted to stand, be a precedent of widespread public significance. It represents a serious curtailment of the right of employers to deal with recalcitrant employees and grants to strikers an unneeded and unwarranted immunity from discharge. It not only violates a basic principle, established by this Court and

*The Company employs 760 agents. The Board's order involves 197 agents of whom 40 are Washington agents (R. 63-5).

upon which this Court has vindicated the constitutionality of the Act, but is also in irreconcilable conflict with other decisions of this Court interpreting the meaning of § 2(3).

The constitutional validity of the limitations put upon the right to discharge by the Act was early challenged before this Court. The Act was upheld as a proper measure of removal of obstructions to interstate commerce because its basic theory was not the limitation of the right to discharge which is, of course, nothing but the elementary right to enter a contract of employment or to refuse to do so, but rather the protection of the correlative right of employees to organize. Thus, the right to discharge was only limited so that it could not be used for the purpose of interfering with rights of employees which the Congress sought to protect. This basic thesis is made abundantly clear by this Court in upholding the Act in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and in *Associated Press* v. *N.L.R.B.*, 301 U.S. 103 (1937).

In the *Jones & Laughlin* case this Court stated the controlling principle as follows:

> "Respondent asserts its right to conduct its business in an orderly manner without being subjected to arbitrary restraints. What we have said points to the fallacy in the argument. Employees have their correlative right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *Texas & N.O.R. Co.* v. *Railway Clerks, supra; Virginian Railway Co.* v. *System Federation, No. 40.* Restraint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious. * * * The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge

them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised *for other reasons than* such intimidation and coercion. *The true purpose* is the subject of investigation with full opportunity to show the facts." (Italics supplied.)

In the *Associated Press* case this Court stated:

"* * * The Act *permits a discharge for any reason other than* union activity or agitation for collective bargaining with employees. * * * The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his [the employee's] relationship for any cause that seems to it proper *save only as a punishment for, or discouragement of, such activities as the Act declares permissible.*" (Italics supplied.)

Neither the Board nor the court below found that the object of the Company's action in discharging the Washington agents was to interfere with their rights protected by the Act, and inasmuch as the reason for the discharge of the strikers was identical with the reason for the discharge of those who did not strike but worked in violation of the reporting rule, whose discharge the Court below held valid and effective, the decision below is a wide departure from the basic principle established by this Court.

Decisions of this Court interpreting § 2(3) of the Act clearly indicate that an employee on strike may be separated from his employment. In *N.L.R.B.* v. *MacKay Radio & Telegraph Co.*, 304 U. S. 333 (1938) it was held that employers may replace strikers, and in *N.L.R.B.* v. *Fansteel*

Metallurgical Corp., 306 U.S. 240 (1939), the discharge of known strikers was upheld. No basis upon which to reconcile the decision below that § 2(3) precludes the exercise of the right to discharge with the decision in the *MacKay* and *Fansteel* cases is apparent.

The public importance of a clear criterion against which an employer may measure his exercise of the right to discharge cannot be overestimated. This court has employed a consistent rationale to the decision of questions concerning that right and has thereby established such a criterion. But the decision below is in conflict with the decisions of this court and thereby throws doubt upon what has been considered a well-established rule. In view of the considerable public undesirability of such a result, the decision below should be reviewed by this court and the conflict resolved.

2. The only unfair labor practice found by the Board upon which to base its reinstatement order[9] was the Company's refusal to reinstate the agents on November 11. The Company refused the offer to return to work made on November 11 because the offer contemplated the reinstatement of the agents whom the Company believed it had effectively discharged, and was, therefore, not an unconditional offer. The Board held, however, that the offer was unconditional, arriving at such a conclusion by finding that *all* the agents were strikers and that the discharges were tactical and ineffective. Under such findings the Company would have been obligated to take back all of the agents whose places had not been filled upon their application, and, thus, the offer of November 11 would have been unconditional. But the court below disagreed with the

[9] §10 of the Act empowers the Board to order a remedy only in cases where there has been an unfair labor practice.

Board and found that some of the Washington agents had been effectively discharged and that the Company was not obligated to reinstate them. In view of the undisputed fact that the offer of November 11 was conditioned on the reinstatement of all agents, including those whom the lower court found to have been effectively discharged, the court's decision requiring the reinstatement of those, who had not been discharged, with back pay from November 11, holds in effect that an unconditional offer to return to work is not necessary. This is tantamount to holding that an employer, who has committed no unfair labor practice, is liable for reinstatement and back pay to strikers who have never abandoned their strike. The Board itself has never contemplated such a result.[10] This court has not passed upon the question of the necessity, in order to be entitled to reinstatement, of an unconditional offer by strikers to return to work but the question is here squarely raised and because of its wide importance should be settled by this court.

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[10]The Board itself developed and has consistently recognized the established principle that economic strikers must make an unconditional offer to return before refusal of reinstatement is an unfair labor practice—even though (as is not the case here) the condition is one that the employer is required by the Act to perform. *In the matter of Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 945 (1938); *In the matter of H. G. Prettyman*, 12 N.L.R.B. 640, 669 (1939); *In the matter of V-O Milling Co.*, 43 N.L.R.B. 348, 361 (1942); *In the matter of Indiana Desk Co.*, 56 N.L.R.B. 76 (1944); *In the matter of McGough Bakeries Corp.*, 58 N.L.R.B. 849, 856 (1944), and recognized by the court. *N.L.R.B.* v. *Register Publishing Co.*, 141 F. (2d) 156 (C.C.A. 9th, 1944). It is not, under the rule sanctioned in the foregoing decisions, an unfair labor practice to refuse surrender to strikers' demands but only to refuse reinstatement when they abandon their demands and return to work.

CONCLUSION

We respectfully submit that a writ of certiorari should be granted.

HOME BENEFICIAL LIFE INSURANCE CO., INC.

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Dated June 7, 1947.

APPENDIX

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C.A., Sec. 151 et seq.):

* * * * *

Definitions

SEC. 2. When used in this Act—

3. The term "employee" * * * shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *.

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

* * * * * *

Prevention of Unfair Labor Practices

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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In the Supreme Court of the United States

OCTOBER TERM, ~~1946~~ 1947

No. 118

HOME BENEFICIAL LIFE INSURANCE CO., INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 465–474) is reported in 159 F. 2d 280. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–66) are reported in 69 N. L. R. B. 32.

JURISDICTION

The decree of the court below (R. 474–475) was entered on January 7, 1947. The petition for rehearing filed by the company (R. 477–494) was

Upon the expiration in December 1942 of the second of these contracts, lengthy negotiations were undertaken by petitioner and the Union for a new contract (R. 16; 186–188, 283). In the course of these negotiations the Union requested petitioner to modify its reporting-in rule so as to reduce the number of days on which the agents were required to report in to their offices, because of the gasoline shortage at that time (R. 17; 120). Petitioner refused to alter its rule (R. 17; 120–122, 124, 307, 342–343, 344–345). On August 8, 1944, the Union filed strike notices under the War Labor Disputes Act (57 Stat. 163, 50 U. S. C. App., Supp. V, 1501 *et seq.*) requesting that a strike vote be taken, but was officially informed that the War Labor Disputes Act did not apply to petitioner (R. 18–19; 307–308, 437–440). The Union so advised petitioner and stated that it accordingly considered itself free to strike at any time and that a work stoppage might occur (R. 19; 124, 362).

On October 9, 1944, the Washington local of the Union wired petitioner that the Washington agents had voted to report in to their offices only two days a week (R. 19–20; 246, 319–320).[3] Petitioner wired back that any violation of its reporting-in rule on and after October 11 would result in

[3] Accordingly the agents did not report in on October 10; they did report in on October 11 and 12 (R. 20–23; 93, 102).

dismissal (R. 20; 126, 247). Faced with this warning, the Washington local voted on October 12 to go on strike the following day unless the dispute was settled at a meeting scheduled with petitioner for that evening (R. 20–21; 103, 383, 384). The meeting failed to resolve the dispute (R. 21; 76, 99–100). Accordingly, before the conferences came to an end, Union counsel informed petitioner that the Washington agents would not report for work the following day and that "agents who did not report for duty tomorrow or any other time did so for the purpose, by concerted action, of enforcing" their demand for a modification of the reporting-in rule (R. 22; 78). Petitioner responded that if they were going on strike, the Union should not "get so technical" (R. 22; 78, 94, 100). Petitioner also stated that it was "prepared" for a "strike" and might as well have it then as at any other time (R. 95). A telegram reiterating the Union statement was sent to petitioner the following morning (R. 22; 79–80, 103, 240). On October 13, 1944, most of the Washington agents went on strike, engaging in a complete work stoppage (R. 22; 322). Petitioner, predicating its action on its warning that any agent failing to report to the office prior to going out on his route would be fired, discharged all who failed to appear that morning (R. 22; 68, 388, 400). Several other agents who reported to the office and worked on that day, subsequently joined the

strike and were thereupon also discharged (R. 23; 370–371, 372).[4]

A similar sequence of events took place at petitioner's Norfolk office. The Norfolk agents, like those at Washington, determined on October 13, 1944, to report in to the office only 2 days a week, and were warned that such a violation of the 5-day reporting rule would result in dismissal (R. 23–24; 168, 171, 348, 349, 375, 420). Thereupon, on October 20, 1944, a number of the Norfolk agents went on strike (R. 24; 348, 349, 378, 401–402, 407). Here petitioner admittedly was aware that the men were on strike and yet, as at Washington, it promptly discharged the striking agents for failing to report in (R. 24; 68, 168–170, 365, 373–376, 377–378, 388, 401, 420–421).

On October 19, a number of petitioner's Petersburg agents went on strike in sympathy with the Washington agents and to secure their reinstatement (R. 25; 68, 172–174, 389, 402). Thereafter, in succession, between October 19 and October 30, the Union locals in Knoxville, Lynchburg, Staunton, Portsmouth, and Baltimore also went on strike in sympathy with the Norfolk and Wash-

[4] Petitioner introduced evidence at the hearing before the Board indicating that a minority of the Washington agents, although not reporting at the office on October 13, otherwise went about their regular duties (R. 23; 161; 371). Testimony to the contrary was also adduced (R. 38; Tr. 2488–2495, 2947–2958, 2742–2749, 2750–2775). The Board, however, made no final resolution of the factual issue thus raised (R. 36–38).

ington agents, and to secure their reinstatement (R. 25; 68, 172, 176–180, 329–330, 354–355, 389–391, 403–405).

Negotiations between petitioner and the Union continued during the strike and on November 11, 1944, the Union, on behalf of the strikers, informed petitioner that the strikers were tendering their services to petitioner unconditionally and were prepared to resume work (R. 3, 28–29, 40–41; 88, 241, 323–324, 327–328, 337, 349–350, 355–356). Petitioner rejected this tender, stating that without a solution of all matters in dispute during the negotiations, it was unwilling to reemploy any of the strikers (R. 29; 86–87, 134–136, 241–243, 323–324, 328, 331–332, 338, 349–350, 356).

On this date, save for perhaps one exception, no new employees had been hired to fill the jobs held by the agents prior to the strike and all of these positions were then available (R. 29; 370, 376, 377, 379, 380, 381).[5]

Upon these facts the Board found that the conduct of the Washington and Norfolk strikers in ceasing work in protest against the reporting-in rule and the conduct of the agents in other district offices in striking in sympathy, constituted con-

[5] On the same day that the strikers made the request for reinstatement, but whether before or after the request does not appear from the record, a new employee, Philips, was hired to fill the job of Chaplin, a striker (R. 29; Tr. 2068). One witness, however, testified that he had heard that Chaplin had died during the course of the hearing (R. 29; 380).

certed activity within the meaning of Section 7 of the Act (R. 2). The Board accordingly found that inasmuch as these employees "ceased work as a result of a current labor dispute," they remained employees within the meaning of Section 2 (3) of the Act (R. 2). The Board therefore held that petitioner's refusal to reinstate the striking employees on their unconditional request constituted a violation of Section 8 (1) and (3) of the Act (R. 3). Consequently, the Board, to effectuate the policies of the Act, required petitioner to reinstate all the striking employees and give them back pay from November 11, 1944, the date of its refusal to reinstate (R. 3, 5–6).

On July 15, 1946, petitioner filed in the court below a petition to review the Board's order (R. 449–452). The Board filed its answer and request for enforcement of the order (R. 453–461). On January 7, 1947, the court entered its opinion (R. 465–474) in which it held that the Washington agents had engaged in a lawful strike on October 13 (R. 469, 471), but that petitioner was unaware of the strike and discharged these employees because it mistakenly supposed that the strikers were merely refusing to report to the office prior to commencing work (R. 469–470). The court held further that the status of the strikers as employees was protected by Section 2 (3) of the Act and that they could not be discharged for engaging in a lawful and protected activity despite petitioner's mistaken belief that their conduct was

merely a violation of a working rule (R. 471). The court concluded, therefore, "that the men who struck on October 13 and offered to return on November 11 are entitled to reinstatement" (R. 471). In view of its holding, however, that only those Washington employees who were actually on strike were protected (R. 471–473), and in the absence of a Board finding as to which of the employees did not cease work, but merely refrained from reporting in to the office, the court remanded the case to the Board to make such a determination so that their names might be omitted from the list of those to be reinstated (R. 473).[6] The court agreed with the Board that the strikers on November 11 had unconditionally offered to return to work (R. 469, 474) and therefore enforced the Board's order as to all the strikers outside Washington (R. 474).

On January 7, 1947, the court entered its decree in accordance with its opinion (R. 474–475). Petitioner's request for rehearing was denied on March 10, 1947 (R. 476–494, 496–497).

ARGUMENT

1. The issues raised by the petition for certiorari are predicated on the conclusion of the court below that the company did not know at the time it discharged the Washington agents that they

[6] The court below also, under its remand, instructed the Board to consider anew the date from which the back pay of the Washington strikers should run (R. 473). Petitioner raises no question as to this matter.

had ceased work by reason of a strike. The evidence, we submit, fully supports the Board's finding (R. 22, 37) that the company was not under any such misapprehension.

In addition to the statement and telegram advising the company that "agents who did not report for duty tomorrow or any other time did so for the purpose, by concerted action, of enforcing demands for relief from a situation created by the gas shortage" (R. 78, 240, 94), a union representative testified that Mr. Tucker, counsel for the company (R. 107), said, after Mr. Thatcher had made the above statement (R. 94–95):

> "Oh, Herbert, don't get so technical. You mean you are going to strike?"
>
> * * * * *
>
> And he said, "I am advising you now that any one that fails to report tomorrow will be discharged."
>
> Q. Was anything further said:
>
> A. I said to Mr. Tucker, I said: "Well this is a pretty pace we have come to."
>
> Mr. Tucker said: "Yes, we have been looking for this for some time. We expected to have a strike sooner or later and we might as well have it now. We are prepared for it now as well as we will be at any other time."
>
> Q. Did you hear anybody else say anything?
>
> A. With that, Mr. Franklin, president of the Washington Local addressed him-

> self to Mr. Tucker and said: 'Mr. Tucker, do I understand you correctly that when none of us report tomorrow, if we don't report tomorrow, that we are discharged despite the fact that we are in concerted action?'
>
> Mr. Tucker said, "You are fired if you don't report."

Since the Board's finding that the company knew that the men were going on strike before it discharged them is adequately supported, there is no need for reaching or determining the issue raised by petitioner and passed upon by the court below.

2. The question posed by the decision below as to an employer's right to discharge for concerted activity when he acts under a misapprehension is one which is not likely to arise except in the most unusual situation and which is therefore not of general importance. In any event, we submit, the decision below on the point is correct.

Petitioner does not challenge the general principles (summarized by the court below (R. 470–471)) that the Act prohibits the discharge of employees merely because they have taken part in a strike and that the Board may order the reinstatement of strikers whose positions have not been filled. Basing its argument on the court's finding that the company was unaware of the strike at the time of the discharges, petitioner urges that the decision below compels it to reinstate striking employees whose discharges were

motivated by reasons other than those proscribed by the Act. From this, petitioner concludes, there could have been no anti-union animus in its discharges and no discrimination within the meaning of the Act. To buttress this conclusion, petitioner cites language from *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, to the effect that an employer may exercise freely his right to discharge employees for any cause that seems to him proper "save only as a punishment for, or discouragement of, such activities as the Act declared permissible" (Pet. 7–8).

This is undoubtedly true in the normal situation where motive is the all-important factor. Since the passage of the Act, those employers who discharge employees because of their union activities are loathe to assert that fact, but almost invariably seek to justify the discharge on other grounds, for example, the alleged inefficiency or other shortcoming of the employee. Where such grounds are alleged, the issue is the employer's true motive; the discharge is of course valid unless it is established that the reason offered was merely a pretext and the true cause was the desire to interfere with or discourage legitimate union activities. Such a situation was present in both the *Jones & Laughlin* and *Associated Press* cases, *supra*. See *Matter of Jones & Laughlin Steel Corp.*, 1 N. L. R. B. 503, 511–515; *Matter of The Associated Press*, 1 N. L. R. B. 788, 794–800.

It was in this frame of reference that the Court passed on the above cases. But even in those cases, the Court carefully articulated the basic purpose of the Act as a guarantee of the right of employees to organize, to bargain collectively, and to engage in concerted activities for mutual aid and protection without restraint or coercion by the employer. *Jones & Laughlin, supra,* at p. 33; *Associated Press, supra,* at p. 129, 132.

In this case an employer seeks no pretext for a discharge but asserts as a ground for discharge conduct constituting part of the activities which the Act protects. In such a situation, the interference with the rights which the Act was essentially designed to guarantee is direct and basic, and the motive of the employer becomes immaterial. In *Republic Aviation Corp.* v. *National Labor Relations Board* and *National Labor Relations Board* v. *LeTourneau Company of Georgia,* 324 U. S. 793, at 805, this Court held that violations of the Act may be found despite an express recognition that the employer's conduct was not motivated by opposition to a *particular union or to unionism* in general (*id.,* at 795, 797, 805).[7]

[7] In the *Republic* case, one employee was discharged for violation of a no-solicitation rule, and others for wearing union steward insignia contrary to the employer's orders. In the *Le Tourneau* case, employees were laid off for distributing union literature on the company parking lot in violation of a rule prohibiting distribution of any literature there.

So here, where the employer discharged the striking agents for failure to report to the office, when such failure to report was necessarily involved in the act of striking, the employer's disciplinary action, regardless of his intent or motive, discriminated in the most real sense against the right to strike. Petitioner's mistaken belief, however honestly entertained, that merely a rule of employment was being violated cannot convert lawful and protected concerted activity, such as the strike here involved, into unlawful conduct which the Act does not protect.

This is by no means a novel doctrine, either under the National Labor Relations Act or in the field of the law in general. Thus in *Matter of Mid-Continent Petroleum Corp.*, 54 N. L. R. B. 912, 933–934, decided by the Board in January 1944, it was held that where certain strikers were discharged for allegedly participating in a sit-down strike, the discharges were invalid since it was not affirmatively established that the strikers did in fact engage in such conduct. The Board specifically rejected the employer's contention in that case that as long as he believed in good faith that the employees did engage in a sit-down strike, the discharges were valid.

The doctrine that an individual, once having obtained a right either by contract or by operation of law, may not be deprived of that right because of another's mistake is now firmly estab-

lished in the law. As Professor Williston says in his treatise, "A justification for a refusal to carry out a contract cannot be found in the mistaken belief or opinion, however reasonable, of the existence of supposed facts which if true would have justified the refusal." 3 *Williston on Contracts,* Sec. 839. The person making the mistake must bear the consequences of his error. So also where improvements are made on another's property by mistake, the improver may not recover from the owner. *Green* v. *Biddle,* 8 Wheat. 1; *Rest. of Restitution,* Secs. 40, 41. Similarly, a trespass upon another's land is none the less a trespass because the intruder reasonably but mistakenly believes that he has the right or privilege to intrude. *Rest. of Torts,* Sec. 164. So here petitioner must bear the consequences of his error where in fact he discharged the striking agents for activities in which they had a right to engage.

This is not to say, as petitioner would have us believe (Pet. 6), that the existence of a strike precludes the otherwise valid exercise of the right to discharge. That right is limited only where the discharge is for conduct inherent in the nature of a lawful strike for a lawful purpose. Thus, where the strike takes on an unlawful aspect, or is conducted in an unlawful manner, or for an unlawful purpose, the strikers may be validly discharged. *National Labor Relations*

Board v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 254 (sit-down strike); *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332 (strike in violation of a no-strike clause in an existing contract); *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31 (mutiny).

3. The second question propounded by petitioner (Pet. 2, 9–10)—whether it could be required to reinstate striking employees whose request for reinstatement was conditioned on the reinstatement of employees who had been validly and effectively discharged—is, we submit, not presented on the facts of this case. Both the Board (R. 3) and the court below (R. 469) expressly found on substantial evidence (*supra* p. 7) that the request for reinstatement was unconditional. Indeed, petitioner does not seriously question the evidentiary bases for this finding. Instead, it argues (Pet. 9–10) that the court, in so finding, did not consider certain other facts recited in its opinion. Such an assumption is completely unwarranted.

4. The court below remanded the case to the Board for further findings as to the status of the Washington strikers and the validity of their discharges. Until the Board has made its findings as to which of the agents, if any, were invalidly discharged the question as to the validity of the present order of reinstatement is at an interlocutory stage.

CONCLUSION

The decision below is correct with respect to all the issues raised herein. There is no conflict of decisions and no question of general importance is raised. Moreover, the questions presented by the petition have not been finally adjudicated. The petition should, therefore, be denied.

Respectfully submitted.

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JULY 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" * * * shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * * * *

SEC. 10.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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